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# ADMINISTRATIVE LAW BULLETIN

VOLUME 11 — FALL ISSUE, 1958

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ADMINISTRATIVE LAW SECTION

AMERICAN BAR ASSOCIATION

UNIVERSITY OF ARIZ.
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Cite by Volume and Page

(Cite — Ad. Law Bull. —)

*Note:* In citing Winter-Spring Issue correct page numbers by adding 60, e.g., page 15 becomes 75.

PRINTED BY
THE LORD BALTIMORE PRESS, INC.
BALTIMORE, MD.

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## CHAIRMAN'S PAGE

*To All Section Members:*

A busy year lies ahead for the Section and its Committees. This is clearly indicated by the reports of Committees published in the Bulletin and by the very interesting and informative panel discussions at the Annual Meeting in Los Angeles. It is hoped that it will be a useful and constructive year both from the standpoint of the Bar in general and the public. It should also prove to be most helpful from a "bread and butter" standpoint to the members of the Section. The inside cover pages of this issue give the names and addresses of the Officers, Council Members and Committee Chairmen.[1] The work of the Section is initiated by the thirty-odd committees. By reference to this list members of the Section may know whom to contact when matters concerning agency practice come up that will be of interest to the Section. No one lawyer has had experience with all of the hundred-odd federal agencies and it is of the utmost importance that we be advised of your problems in dealing with administrative agencies.

Dr. Frank C. Newman of the University of California is preparing for the Section, agency by agency, a bibliography of source material as to agency practice. He has completed a like task for the Office of Administrative Procedure of the State of California. We believe this will be one of the most useful reference works in our law libraries. Early in December an Agency Practice Forum is to be held by the Section in Washington, D. C.[2] Agency counsel and experienced practitioners in the administrative field will conduct particularized discussions of practice matters. All members of this Section are invited to attend. It is believed that it will be as helpful and valuable as have been similar forums conducted by the Bar Association of the District of Columbia and the Federal Bar Association.

During the December Practice Forum in Washington the Council of the Section will hold an interim meeting to consider the

[1] A complete list of committee membership will be published in a future issue of the Bulletin.

[2] December 11 and 12, 1958 at the Mayflower Hotel. Complete details at page 53 *infra.*

Report of the Committee on Drafting of a Code of Standards of Agency Conduct in adjudicatory proceedings. The report of the Ad Hoc Committee on this subject, appointed by Chairman Donald C. Beelar, was submitted at the Los Angeles meeting. References thereto appear in this Bulletin. Subsequently the House of Delegates authorized the President of the Association to designate the Section to complete the drafting of such a code and supporting legislation. This Committee, headed by Judge David W. Peck of New York as Chairman, has been appointed and the names of the committee members and its consultants appear in this Bulletin. It is a challenging assignment. We are hopeful that all members of the Section with their divergent and varied experience in administrative practice in different agencies will carefully study the preliminary report appearing in this issue. They should submit their suggestions and comments promptly to the National Chairman or the Chairman of this Committee. In this connection we must do a good lawyer-like job with a result that is practical and sound and which will meet the approval of the Board of Governors, the House of Delegates and, if approved, of Congress.

The Chairman of the National Committee during the coming year will be Bernard J. Gallagher, Union Trust Building, Washington, D. C., and the Vice-Chairman, Valentine B. Deale, 1001 Connecticut Avenue, N.W., Washington, D. C.

Finally, we hope that all of our membership will, by active participation in the work of the Section or one of its committees, push forward to completion the important tasks to which the Section is committed and carry forward the work already so well advanced.

JOHN B. GAGE, *Section Chairman*

## REPORT OF SPECIAL AD HOC COMMITTEE ON CODE FOR AGENCY CONDUCT *

This Special Committee was appointed by your Section Chairman in May of 1958 to present a draft Code for Agency Conduct to be submitted for the Section's consideration at the annual meeting of the American Bar Association to be held in August 1958. Meanwhile in July 1958 Congress adopted a Code of Government Ethics for all federal personnel, and at least two federal agencies have adopted Codes for their members and staffs. Your Committee endorses these actions and urges all other federal agencies to take similar action applicable to their respective duties as more fully described below. This Report does not propose a comprehensive uniform code, but it does propose certain recommended minimum requirements for all Codes of Agency Conduct.

There has been widespread public concern about the possible breakdown of integrity and impartiality in some of the agencies. This Report does not consider past asserted improprieties which may await further legislative or judicial action. Rather, its purpose is to suggest preventive measures designed to avoid a recurrence of evils.

On July 11, 1958, the Senate agreed to a House-approved Code of Government Ethics adopted in August 1957, H.R. Con. Res. 175, 85th Cong., 1st Sess. It sets forth an excellent creed of loyalty, diligence and integrity, and it admonishes all federal government personnel that each should not:

> ". . . discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties."

A copy of its full text is attached as *Appendix A*.

The vast majority of government workers are conscientious and loyal, and live and work by ethical standards which are above reproach. The Congressional Code is intended to apply to every

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person in government from the President of the United States to the casual Christmas holiday temporary mail clerk.[1]

This Congressional Code of broad principles can be expanded by a Code of Agency Conduct to guide government administrative agencies and those dealing with them as to proper procedural methods in performing their varied, complex tasks. There are over one hundred federal agencies which adjudicate the rights of parties.[2] Over two hundred agencies of the government prescribe rules.[3] There is an infinite range of matters being considered, ranging from comprehensive regulations of all forms of interstate communication and transportation, to determinations of various rights and duties affecting agriculture, labor, securities, government contracts, public lands and many other subjects.

The duties within a particular agency also vary widely. For example, one such duty may be to make decisions between rival, private applicants for various certificates, permits and licenses; another, to award reparation for past acts proven violative of federal regulatory standards, such as "reasonable rates"; again, to prescribe binding rules affecting labor and business; still another, to initiate or recommend civil or criminal prosecution in the courts. Likewise, all agencies make daily informal disposition of a vast array of individual problems ranging from determining a veteran's claim or a citizen's social security benefit to resolving complex industrial, financial, contractual, common carrier, labor, agricultural or other rights and duties.

The purpose of creating these agencies would be defeated if a Code of Agency Conduct tied elaborate red tape about their activities; or isolated them from the public into an ivory tower; or inhibited their conscientious members and staff from normal, informal discussion with other interested public officials or private citizens. Although most agencies perform some quasi-judicial duties, they are not exclusively "courts" acting only from the bench in deciding "cases or controversies" between opposing liti-

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[1] See the statement by Senator Johnson of Texas in reporting H.R. Con. Res. 175, 104 Cong. Rec. 12331 (July 11, 1958). Attached as *Appendix A*.

[2] See Hearings before a Subcommittee of the Judiciary Committee on S. 17, 83d Cong., 1st Sess. 5 (1953); Hearings before a Subcommittee of the Committee on Government Operations, Study of Administrative Organization, 85th Cong., 2d Sess. 21 (1958). The exact number of agencies varies according to the method of counting; thus the department of Health, Education and Welfare includes examiners dealing with Social Security, Food and Drug, and other matters.

[3] Hearings before a Subcommittee of the Committee on Government Operations, Study of Administrative Organization, 85th Cong., 2d Sess. 63 (1958).

gants who are represented by counsel. Their varied duties often require also a free flow of information by easy, informal meetings with the public in appraising and evaluating their varied problems.

Congress has generally delegated various broad powers to these agencies. But after it creates an agency it provides little supervision of its performance, except as may arise incident to hearings on annual appropriations, confirmation of members, proposed amendments to basic legislation, and occasionally through inquiry as to some specific matters brought to the attention of Congress.

Judicial review is generally limited to determining whether the agency has acted within statutory authority, or by fair procedural rules, or within constitutional limits.

The wisdom of the agency in executing its legislative duties, and the propriety of its procedural practices and methods, is seldom subject to judicial review. Congress has recently created an Oversight (perhaps better called Overseeing) Committee to explore possible methods of reviewing the policies of the agencies in carrying out their various delegated powers.[4]

The President of the United States also frequently shares, by law, in the activities of these agencies.[5] He not only appoints the members and under some statutes designates the chairman, but by statute he is often delegated the duty of approving, directing, executing or nullifying the acts of various agencies. Congress has occasionally also provided a method of notice and opportunity for interested persons to present their views in such matters to the President or such persons as he may designate.[6] Thus, in certain cases the President and his executive staff have a most appropriate right and duty to be advised of, and to participate in, certain defined areas of agency activities.

Your Committee does not here consider or propose any restric-

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[4] *Id.* at 10.

[5] The Index to U.S.C.A. and 1957 Supp. contains over 18 pages of fine type single spaced duties of the President, many of which involve review of determinations as to matters lodged with various administrative agencies. For example, to approve CAB certificates for overseas air transportation, 49 U.S.C.A. § 601; to direct the FTC to investigate and report facts of alleged violations of anti-trust laws, 15 U.S.C.A. § 46(d); to give requisite approval to any findings by the FMB that national policy requires it to construct commercial vessels for private charter operations, 46 U.S.C.A. § 701ff; to request the US Tariff Commission to make investigations, 19 U.S.C.A. § 1364(a); and to take discretionary action as to foreign trade agreements, 19 U.S.C.A. § 1351 *passim*. During war or national emergency he has far greater power over these agencies. See 50 U.S.C. App.

[6] 19 U.S.C.A. § 1354.

tions on proper exercise of the President's powers and varied statutory duties.

Members of the Congress throughout our history have been the avenue through which the average citizen, remote from Washington, D. C., has lodged his complaints or protests against executive or administrative action. This derives historically from the arbitrary acts of a king or parliament and is preserved in our constitutional

> "right of the people . . . to petition this Government for a redress of grievances."

And Senators, Congressmen, Governors, and other public officials frequently communicate the views of their constituents or of others to administrative agencies and to executive departments. Private citizens do the same.

Your Committee likewise believes this right of petition, like that of freedom of speech, is fundamental to our tradition, and we do not propose any restriction on the proper exercise of these rights by private citizens, or by the office of the President, Congress, or other public officials.

While your Committee does not propose to eliminate or limit proper avenues of communication, it does seek to restrain them from becoming possible channels of improper influence.

Most agencies now have procedural rules.[7] Many regulatory statutes and portions of the Administrative Procedures Act require certain cases to be decided exclusively on a public record of evidence taken under oath. In other cases there is no such requirement.

There now exists, in addition to the Congressional Code of Ethics, the following:

> (1) A comprehensive Code of Ethics adopted some years ago by the Association of Interstate Commerce Commission Practitioners. It applies to lawyers and others authorized to practice before it.
>
> (2) Canons of Ethics adopted by the Securities and Exchange Commission for its Members and Staff in July 1958.

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[7] Compilation with Citations of Executive Departments and Agencies which Publish, Enforce or Adhere to Rules of Practice or Procedure with Respect to Hearings, Adjudications, or Licensing, 83d Cong., 1st Sess. Committee Print of Committee on Judiciary, Subcommittee on Improvements in Judicial Machinery; and see Federal Trade Commission, Rule 15 as to hearings in adversary proceedings, 15 U.S.C.A. following § 45.

(3) A Code of Conduct was adopted by the Federal Power Commission on July 31, 1958.

Your Committee commends these agencies for their action, and their Codes as guides or patterns for others, and recommends that all other agencies adopt similar codes, or canons, modified as required to meet the particular framework of the respective statutory duties of each.

Your Committee believes the greatest immediate need is for minimum uniform provisions forbidding *ex parte* communications with any agency as to any pending quasi-judicial proceedings. The Code should forbid any such communication, whether written or oral, and whether by public or private citizens, except on notice to other interested parties, with full opportunity afforded for them to reply if in writing, or to be present if oral, and to make seasonable reply before any decision is made. This could be included in a comprehensive Uniform Code of Agency Conduct if, on further study, that proves practical and desirable. It could be done at once by each agency incorporating the substance of such a requirement in a binding rule.

Your Committee recommends that these requirements be limited to pending quasi-judicial matters, but has chosen the term "adversary proceedings" to avoid confusion with "adjudicatory," "rule-making," and other definitions in the Administrative Procedure Act.[8]

Your Committee recommends the following draft of such a rule, or amendment to an existing Code, to accomplish these minimum requirements.

1. *Definition*

(a) The term "Agency" includes any federal Department, Commission, Board, Agency, Administration, Authority Bureau, Division, or other Federal Unit having jurisdiction to make, or to recommend decisions in adversary proceedings.[9]

(b) The term "person" means any individual, whether in public or private life, or any association of persons whether by partner-

[8] See comment of J. Smith Henley, now nominated for United States District Judge, E. D. Ark., formerly Director, Office of Administrative Procedure, Department of Justice, Hearings before a Subcommittee of the Committee on Government Operations, Study of Administrative Organization, 85th Cong., 2d Sess. 13, 20 (1958).

[9] Definition (a) will of course substitute the name of the particular agency or agencies affected by an adopted rule.

ship, corporation, trade association, union, governmental body or otherwise.

(c) The term "adversary proceeding" means any proceeding before an agency between contending parties, public or private, involving the exercise of agency authority in the settlement or determination of right, obligation, liability, sanction or status of a person or persons by an order applicable or to be directed to a named party or parties to the proceeding, and required by constitution or statute to be based solely upon a hearing of record.

2. *Ex Parte Communications*

In any pending adversary proceeding, it is contrary to public policy and to this Code of Agency Conduct for any person to communicate privately with, or entertain a communication from, either in writing or orally, concerning the merits, disposition, effect, or other procedural or substantive phases of such pending adversary proceeding, any Agency officer or employee who is authorized to participate in deciding the matters in its proposed or final form.

3. *Petitions for Interim Relief*

If any person desires any intervening procedural, substantive or emergency relief pending determination of such adversary proceeding, it shall be submitted in writing with notice to all other interested parties and subject to such further rules as the Agency may prescribe.

4. *Violations*

If this public policy and Code of Agency Conduct is violated by any person either innocently or otherwise:

(a) By any written communication which fails to show due notice to other interested parties, the recipient shall promptly return it to the sender, courteously calling attention to these rules, and enclosing a copy. A carbon copy of this acknowledgment shall be placed in the publicly available file or docket of the adversary proceeding which it concerns.

(b) By a telephone call or other oral communication, the speaker shall be courteously but firmly advised at the outset of any such conversation that, under this new Code of Agency Conduct, it is contrary to public policy and to this Code to discuss such proceeding privately, and his attention directed to the above provisions authorizing written application for any further re-

quested relief. If the speaker should persist, the Agency official who is addressed shall make a fair, written summary of any such conversation and place it promptly in a public file or docket, with written notice to the speaker and all other interested parties that this action has been taken.

5. *Effect of Violations*

Any written or oral communications made in violation of paragraphs 2 to 4 shall be ignored by the Agency in deciding such pending adversary proceedings, and the Agency shall take such further disciplinary action as it deems appropriate under the circumstances.

6. *Right to Examine Files and Reply to Matters Reported Therein*

All persons shall have access to the public files and dockets of all adversary proceedings during normal business hours, and any interested person shall be given notice of, and have an adequate opportunity before decision to make seasonable reply to any *ex parte* matters reported therein.

We believe these proposals do not involve undue red tape. We recognize it changes long-practiced habits of informal discussion between the agencies, the Congress, the executive offices and departments, and private individuals. Adoption of this Code will not cure this instantly because, with best of intentions, it is sometimes difficult to define precisely all "adversary proceedings." The varying statutory provisions suggest some complexities. Often the communication has been in good faith, and less frequently with intent to exert improper influence. The latter should be promptly eliminated. To do so imposes some added burden, but your Committee believes that, if each agency will adopt these minimum requirements of a Code of Agency Conduct, it would diminish the volume of such letters and calls as rapidly as its adoption becomes known.

We also believe and intend that these proposals shall at the same time preserve a proper freedom of correspondence and discussion between citizens and officials concerning all other matters within the purview of these administrative agencies which are not pending adversary matters.

We realize that these proposals are far from perfect. But they provide a standard which may guide federal personnel and private citizens appearing before them in fair play in contested matters.

They do not abridge constitutional privileges of petition because they treat all parties alike and protect against undue influence.[10]

We think these provisions in a Code of Agency Conduct would supplement the new congressional Code of Government Ethics. In the words of Senator Johnson: [11]

> "at the very least it may serve to encourage the thoughtless to be more thoughtful. It may cause caution instead of carelessness. It may add strength to the weak and re-fortify those who are strong.
>
> "Additionally, it may serve to spearhead other steps that will encourage or require greater vitality to public trust and at the same time put a brake on those who contribute to thoughtlessness or deliberate dereliction in an effort to obtain special favor or personal gain."

Accordingly, your Committee recommends that the Section of Administrative Law adopt and transmit to the House of Delegates of the American Bar Association for its consideration, adoption and support, the foregoing proposed outline of minimum requirements for a Code of Agency Conduct.

Respectfully submitted,

ALBERT E. STEPHAN, *Chairman*
GUY FARMER
JOHN B. GAGE
DAVID W. PECK

Editor's Note:

The Chairman of the Section accepted, and the House of Delegates adopted, the recommendation of the Board of Governors as follows:

> *Resolved,* That the President of the Association is hereby authorized and directed to designate a Special Committee of the Association, or at his election, to authorize the Section of Administrative Law to draft a code of agency-tribunal standards of conduct and to draft necessary supporting legislation and to report back to the House or the Board for approval of the Code; to advise and consult with the Congress of the United States, the Executive and independent agencies of Government in furtherance of the objective of eliminating ex parte influences or pressures from the trial and decision of agency cases.

Pursuant to this resolution the President of the Association has designated the Administrative Law Section to carry out this directive. A committee has been appointed to complete the drafting of such a code and supporting legislation. The committee's membership is included in this issue of the Bulletin.

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[10] Cf. *United States v. Slaughter,* 89 F. Supp. 205 and 876 (D.C.D.C. 1950), involving the constitutionality of the Federal Regulation of Lobbying Act, 2 U.S.C.A. §§ 261-270.

[11] In presenting for Senate action H.R. Con. Res. 175, 104 Cong. Rec. 12332 (July 11, 1958).

## Appendix A

## CODE OF ETHICS FOR GOVERNMENT SERVICE

Any person in Government service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government Department.
2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.
3. Give a full day's labor for a full day's pay; giving to the performance of his duties his earnest effort and best thought.
4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.
6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.
7. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties.
8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.
9. Expose corruption wherever discovered.
10. Uphold these principles, ever conscious that public office is a public trust.

## CODE OF ETHICS FOR GOVERNMENT SERVICE

Concurred in by both Houses of Congress July 11, 1958

### Statement of Senator Johnson

MR. JOHNSON of Texas. Mr. President, I ask unanimous consent for the present consideration of House Concurrent Resolution 175, Calendar-No. 1861.

The PRESIDING OFFICER. The concurrent resolution will be stated by title for the information of the Senate.

The LEGISLATIVE CLERK. A concurrent resolution (H. Con. Res. 175) proposing a code of ethics for Government service.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Texas.

There being no objection, the Senate proceeded to consider the concurrent resolution.

MR. JOHNSON of Texas. Mr. President, I ask unanimous consent to have printed in the *Record* at this point as a part of my remarks a statement concerning the purpose of the concurrent resolution.

There being no objection, the statement was ordered to be printed in the *Record,* as follows:

The purpose of this resolution is to set forth in a readily understood but meaningful manner basic standards of conduct as a guide to all who are privileged to be a part of the Government service. The word "guide" is used advisedly. The resolution creates no new law; imposes no penalties; identifies no new type of crime; and establishes no legal restraints on anyone. It does, however, etch out a charter of conduct against which those in public service may measure their own actions and upon which they may be judged by those whom they serve.

The original framers of this resolution, together with all those who now support its adoption, do not contend for a moment that it will wash all evil from the soul

of the Government or the individuals therein. They do believe strongly, however, that it can do no harm and has great possibilities of doing much good.

At the very least it may serve to encourage the thoughtless to be more thoughtful. It may cause caution instead of carelessness. It may add strength to the weak and refortify those who are strong.

Additionally, it may serve to spearhead other steps that will encourage or require greater fidelity to public trust and at the same time put a brake on those who contribute to thoughtless or deliberate derelictions in an effort to obtain special favor or personal gain.

*Coverage*

The committee understands and intends that this resolution apply to every servant of the public whether he be the President, a Member of Congress, a lifelong career employee, or an employee engaged only on a temporary basis to expedite the movement of mail during the Christmas rush.

The committee does not subscribe to nor could it support any code of principles that applied only to some and not to others. It believes there is no room in a great democracy such as ours for any set of double standards.

In that framework, the committee unanimously approved the resolution as providing a needed yardstick for the use of all who serve in the Federal service and for the use of those being served with which to measure and judge the propriety of official and personal conduct of every public official and employee—whether elected or appointed—and without regard to the position held or the duties performed.

The PRESIDING OFFICER. The question is on agreeing to the concurrent resolution.

The concurrent resolution was agreed to.

# INFLUENCE IN FEDERAL AGENCY EX PARTE PROCEEDINGS, SHOULD WE ADOPT A CODE OF AGENCY ETHICS?

CLAIR ENGLE *

The timeliness and importance of the subject of our panel discussion today—"Influence in Federal Agency *Ex Parte* Proceedings, Should we Adopt a Code of Agency Ethics"—cannot be denied.

The many recent scandals which concerned the regulatory agencies indicate the need for a reevaluation and a raising of the ethical standards of government. This, in no way, is meant to disparage the level of morality in our government of today. Indeed, the overwhelming weight of opinion is that the basic integrity of the federal government in most branches is relatively high. However, as said in the Douglas subcommittee report: "Standards of conduct seem high and rising when viewed against the background of fifty years ago. But we are living in the 1950's, not the 1890's, and the need for high standards of integrity, as well as competence, has grown even faster than the standards have risen. Conceivably, the country is falling behind in its ability to deal with the political and ethical problems of the day." Hearings before a Subcommittee of the Judiciary Committee on S. 17, 83d Cong., 1st Sess. 12 (1953).

As our economic and social life has expanded and become more complex, the necessity of ever widening federal regulation has been recognized. There are now over 100 federal agencies that adjudicate rights of private parties; over 200 prescribe rules which vitally affect business, labor, and the general public. *Id.* at 5. The Douglas subcommittee found that the dangerous area, the area in which the temptation to unethical conduct is the strongest, is that in which there are big economic stakes, where the decisions of legislators and administrators directly affect the business, or the property, or the income of particular groups or individuals. The subcommittee further found that most serious ethical problems of public officials are the product of four factors: (1) there is much at stake in public policies which directly affect the income and welfare of individuals, industries, and groups; (2) members of Con-

* Senator Elect from California.

gress have almost free discretion in making these policies, and administrative officials have great discretion in administering them; (3) this discretion is based on the assumption that it will be used only in the public interest and to advance public purposes; and (4) though issues must be decided on their merits, there will always be some interested parties who will not let the wheels of government turn unassisted but will often bring pressure to bear to secure favorable decisions. *Id.* at 19.

The methods of bringing improper pressure to bear upon public officials are myriad. Too frequently recognized are the personal or financial involvement of officials with those they have official contact, and secret communications from parties concerning pending business. Thus, the Administrative Reorganization Act of 1957 (S. 932, H.R. 3350) which sought to implement some of the Hoover Commission recommendations on the improvement of legal services in this field set out general standards of conduct for everyone who appears in a representative capacity before agencies of the federal government. Among other things, these standards would have prohibited: (1) communicating privately with any agency representative with respect to the merits or disposition of any contested adjudicatory proceeding pending before the agency without notice to his adversary; and (2) attempting to sway the judgment of the agency improperly by threats, offers of special inducements, gifts, favors, etc.

Though the attempt to regulate those who represent others before the agencies seems good, yet there is a more direct approach to the problem. We should strive to raise the ethical standards of the government officials themselves. This approach was recently taken by H.R. Con. Res. 175, 104 Cong. Rec. 12331 (July 11, 1958), which adopted a code of ethics for government service. This code recognizes the same area for concern by providing, among other things, that "Any person in government service should: . . . never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties; [and] make no private promises of any kind binding upon the duties of office. . . ."

To effectuate these general provisions of the code, the following two recommendations are made:

(1) The adoption of a code for agency conduct similar to that proposed by the ABA's Administrative Law Section and also Section 9 of the SEC Code of Ethics. It seeks to prohibit *ex parte* communications (oral or written) with any agency as to any pending quasi-judicial proceeding and requires that any such communications be placed in the public file of the case and that all opposing parties be given an opportunity to make seasonable reply. This provision would apply to all such communications received by the agency, whether from within or without the government. This provision is not designed to exclude the legislature or the executive from legitimate participation in agency action. It recognizes that Congress has frequently conferred upon the executive department a right and duty to be advised of, and participate in, certain defined areas of agency activities. And the members of Congress must often play a part in these activities for they are historically the avenues through which the average citizen lodges his complaint or protests against executive or administrative action. This participation, however, should never be secret or go beyond certain fairly well-defined boundaries.

(2) Require all government employees receiving a salary of $10,000 or more or who are in positions of grade GS-15 and above to disclose annually the amount and source of all receipts of income or other things of value, whether in the form of compensation for services rendered or mere gratuities. Possibly it would be sufficient to require disclosure only of the total, together with a list of sources. The Douglas subcommittee fully endorsed the general effectiveness of the principle of disclosure. But the subcommittee only considered and recommended the disclosure of income, and assets, and transactions in the securities and commodities market. Of such disclosure, the subcommittee said: "It is difficult to think of any good reason for not taking this action. It will help to protect the public interest, and will do so without moralizing. It may be an inconvenience, but it can do no real injury to public servants or political leaders, and it will protect from inuendo at the same time that it encourages self-examination of the propriety of one's income and assets." Hearings *supra* at 39. This proposal goes further than the recommendation of the subcommittee by requiring the disclosure of all gratuities, gifts, favors, etc. The greatest difficulty in distinguishing what is proper from what is improper is in the field of gifts. Thus, without prohibiting public servants from accepting all gifts and without moralizing

thereon, this recommendation would encourage government employees to do a bit of self-examination on the propriety of those they do accept. Of course, gifts from relatives would have to be exempt and also those in a minimal amount—but all gifts during the year from any one person would be totaled in determining this exemption. These, however, seem to be the only exemptions possible without letting down all barriers. The receipts of all members of the official's immediate family would also have to be disclosed.

I believe that members of Congress should be under exactly the same standards with reference to official conduct as public officials in the executive departments. As nearly as possible the legislative and executive branches of the government should be under the same conflict of interest statutes. I believe that the executive and legislative office holders should be under the same rules with reference to corporate equities, outside holdings, and similar matters. Congress ought to lead the way in setting high ethical standards. Too many people have the feeling that Congress takes the attitude "Do as I say—not as I do." Since no one investigates the Congress it is even more important that Congress set a high standard for itself.

The best safe guard for public conduct is disclosure. That is the essence of the two recommendations I have made. Prohibiting *ex parte* communication is in effect disclosure because that requires everything to be in the record. It closes the back door and shuts out the private or secret communication. Disclosure of all income, gifts, etc., by public officials will make public service more distasteful to some people, but I suspect more respectable generally. Respect for privacy is deeply ingrained in Americans—and I value it highly, but I see no other way to fully protect the public interest than to require the disclosures which I have suggested.

There are other steps that should be taken, some of them somewhat afield from this discussion. In my opinion the adoption of the two steps here recommended will take us a long way in the right direction.

# SHOULD WE ADOPT A CODE OF ADMINISTRATIVE AGENCY ETHICS?

David W. Peck

It seems to me that the question posed today—Should we adopt a Code of Agency Ethics?—can only have one answer, an affirmative "Yes." The clear call for that answer does not mean, however, that the framing of a code is a simple matter free from difficulties. Rather, there is a problem in defining the area of agency jurisdiction which should be covered by a code, possibly even in specifying the proper provisions of a code. A special committee of the Administrative Law Section, under the chairmanship of Albert E. Stephan, has considered the problem and is submitting a report which I believe will meet the need for a Code of Agency Conduct.

This is an administrative age. The roots go back but the flowering has been in the last quarter of a century. The growing pains attending such rapid growth have been acute, but the administrative agencies have at last reached a maturity which is generally gratifying, though all concerns have not been abated.

There are many of us who have had misgivings which are not altogether dispelled, about combining in one body the legislative, executive and judicial functions so broadly vested in the present agencies. Moreover, police and prosecuting functions are combined with the judicial role. Inherent in such a frame are the seeds of suspicion and distrust. The set-up invites closer congressional surveillance than would ordinarily be given an administrative bureau, the recommendations of the Hoover Commission and the proposed Administrative Practices Act, and it certainly imposes upon the agencies a punctilio of judiciality in the discharge of the judicial function.

The burden of being beyond reproach is heavier on an agency with multiple roles than it is on a court with a single role traditionally isolated and insulated from the pressures and influences which abound legislative and executive bodies. Yet, if administrative agencies are to keep and discharge judicial functions with self-respect and public respect, they must establish and maintain standards of judicial conduct which are uncompromising. In this

endeavor they are entitled to all the aid, cooperation and support which public officials and the legal profession can give.

Obviously the legislative, executive and judicial roles cannot be blanketed under one set of rules of conduct and procedure. It is equally obvious, if judicial standards are to obtain in the judicial area, that the judicial function must be separated out to a degree which makes all concerned with such matters conscious of the fact that they are in the judicial area and expected to act accordingly. Recognition and respect for the role must be mutual on the part of the agency, parties, counsel and outsiders.

So, while we talk in the terms of a Code of Agency Conduct, we should be mindful that we are establishing standards of official, professional and public conduct—an all-around acceptance of standards for dealing with matters in the judicial orbit akin to the accepted manner of dealing in a court.

Perhaps there is some reluctance on the part of some agency members to recognize the need of a code, but certainly all would welcome the observance, both within the agencies and without, of the standards which a code would enunciate. A code should make the judicial task of a commissioner and his aides easier and rightly enhance their prestige. The agencies as well as the public are entitled to a code.

No one today would minimize the importance of a judicial function performed by administrative agencies. The matters over which they have jurisdiction are as vital to the personal and business interests involved as the most important court matters. Nor would anyone suggest that the judicial part should not be performed in a judicial manner. Yet, because the agencies are not a court or their members judges, people dealing with the agencies seem to feel that neither they nor the agency personnel are subject to court standards. At the same time, those employing influence and counter-influence lose confidence in themselves, the opposition and the umpire.

Agency spokesmen have asserted that the agencies have not been influenced by the side or off-side approaches. Although this may be altogether true, there should be no occasion either for apology or assurance. The judicial process in the administrative area should be on a plane where no question of proprieties can arise.

Nor should there be any question or difference about the required conduct. The consideration and determination of matters of a judicial nature should be based solely on a record of evidence

openly taken with an adequate and equal opportunity for all interested parties to be heard. The proceedings should be free of any private or personal approaches by the parties, their counsel, other representatives or friends.

These standards have been stated in codes adopted by two agencies. They must surely be acceptable to all.

The only problem really is in defining the type of proceedings in which a code should apply. In its legislative and executive operations the members and staffs of the agencies should be approachable by citizens and by public officials. The difficulty of definition is that there is not always a sharp line between a legislative or executive function on one side and a judicial function on the other. But the possible nicety of distinction is no excuse for failing to reach a definition of the area in which a code should be applicable. The letter of the code can be reasonably apt and the spirit can abide.

Your committee has suggested a definition of quasi-judicial or "adversary proceedings" to which the proposed code should apply. Perhaps it can be improved upon. But, certainly, it seems to me that the Administrative Law Section should adopt at this meeting a recommended Code of Agency Conduct pursuant to the profession's responsibility for this important segment of the administration of justice.

# INFLUENCE IN FEDERAL AGENCY LAW-MAKING AND ADJUDICATORY PROCEEDINGS—SHOULD WE ADOPT A CODE OF AGENCY ETHICS?

Professor Leo A. Huard

I rise to speak favorably of influence. There was a time—within my own memory—when the word "influence" did not have an evil connotation. In those day, when a man was described as a man of influence, the usual meaning was that he was a person of consequence. He had standing in the community! Today, "influence" is a term of opprobrium—a dirty word. In Washington, a man with influence is almost automatically regarded as a scoundrel. Those who have influence now try to hide the fact. Those who never had it now seek it only with great caution and circumspection. The word itself has been excised from the currency of polite conversation.

Once the term influence brought forth pleasant visions of prosperous, courteous and benevolent gentlemen with substantial gold watch chains across equally substantial waistcoats. Now, it raises hideous nightmares of broadcasting licenses bought and sold, of deep freezes and vicuna.

This is a sad turn of events. Influence—the ability to sway or move other men—is a normal part of community life. A man who can influence no one is a neutral spirit. Neutral in the sense of dull, without weight—a cipher! Not to be confused with the effervescent, delightful sense of the phrase *"neutral spirits."* A lawyer cannot be neutral and weightless. He is by nature and profession an influence peddler. We influence clients, judges, juries and other lawyers. And, all very properly too! A lawyer without influence is a professional eunuch.

It behooves us then to examine very carefully and to consider with grave deliberation any code, or other scheme, designed to cast a stigma on the exercise of influence of every kind and degree. Let us pause for a moment and think in this context of the independent federal regulatory agencies. One of the purposes of many of these agencies is to encourage, stimulate and develop a particular area of trade and commerce. This the agencies do by rules,

regulations, decisions, reports, speeches and press releases. In other words, by giving impetus and direction to the policy of that trade or industry. That, ladies and gentlemen, is influence. By the same token, the regulated trade or industry usually knows best what it needs for a healthy growth and it must be permitted to present its views to the agency even though these views are admittedly biased. When this occurs we have another instance of influence or attempted influence. There is nothing wrong with this arms-length exchange of strongly held points of view. Frequently, the fairest and most sensible regulation is produced in this way. We must take care not to hamper this process by ill-considered, but well-meant, ethical codes.

The concept of trade and industry regulated by independent governmental agencies *requires* that the agency properly influence industry and that industry properly influence the agency. This premise is a foundation stone of our system of federal administrative law. The Duchess in *Alice in Wonderland* said: "If everybody minded their own business . . . the world would go round a deal faster." This is simply not true. The world probably would not "go round" at all. Certainly the world of administrative law would be dramatically slowed down—and perhaps halted.

A short time ago, I was privileged to hear a brand-new commissioner make his first speech to the industry which his agency regulates. He said: "Gentlemen, my door is always open. Come in and talk over your problems with me at any time." I submit that this commissioner's attitude was generally correct. It was a brave statement. Perhaps, braver than the speaker realized. In these troublous times—when administrators are told to avoid the opportunity to be influenced—he might well be misunderstood. By way of contrast, I have recently heard of an agency where the members have become so timid that the regulated industry is complaining that it has no means of making its views known except through formal procedures. The bogeyman of influence has here perverted one of the best and healthiest aspects of the administrative process —the idea of informal conferences to exchange views, to expedite hearings and to streamline the administrative process.

It is true, of course, that influence may become an evil. We have had some unfortunate examples in the very recent past and there are undoubtedly more to come. A moment ago, I said that a regulatory agency should "properly" influence industry. The keyword is "properly." Proper influence is a legitimate and necessary part

of administrative law. Improper influence is illegitimate and unnecessary. It must be eradicated.

Attempts to influence administrative agencies arise from three principal sources: the Congress; the administration; and the regulated industry. The influence impinges on the agency at three main points: in the formulation of overall policy, *i.e.,* the attitude of the agency; in the rule-making process; and, in the decisional process.

The Congress is elected. It is the voice of the people as well as the manifestation of their participation in the day-to-day operations of government. Congress created the independent regulatory agencies and set out their original policies. In that sense, the independent agencies are instruments of Congress in carrying out popular will. In formulating overall agency policy, in developing the attitude of the agency, as well as in administrative legislation, which we call rule-making, the Congress has an interest and a duty. It must supervise agency policy and agency laws to insure that the intent of Congress, the intent of the people, is being carried out. There is no such thing as an *ex parte* approach here. The term *ex parte* is simply not relevant to the situation. It is the duty of Congress, through its committees, to oversee the administrative agencies and even to investigate them from time to time. I stress, however, that this is a function of Congress, not of individual congressmen.

Similarly, the administration, in the person of the President, has been elected and given a mandate to execute a certain policy by the people. Again, the term *ex parte* has no relevance where the President, through his representatives, seeks to influence the broad policies of a regulatory agency or to direct its legislation. I feel quite strongly that the administration also has a function and a duty along these lines. However, if some of you feel that this kind of influence is unhealthy, statutory safeguards can be provided against it by Congress.

In simple terms, I do not buy the proposition that federal administrative agencies must, *in all respects,* be free of supervision and control by the Congress and the Chief Executive. As I have just indicated, some influence from these sources is both necessary and proper. The idea of congressional and administration influence is, of course, a part of a much larger problem than the one we are discussing today. It involves the entire concept of the "independence" of the independent regulatory agencies. Inde-

pendent of what? The Congress? The administration? The industry? The people? It revolves about the constitutional principle of separation of powers. How should that principle be applied to the activities of administrative agencies? How should it affect the relationship of such agencies to the Congress and to the administration currently in power? Lately we have heard a great deal about how the agencies frustrate the intent of Congress. Let us remember also that there have been occasions when regulatory agencies have successfully frustrated important administration policies.

I have indicated at the outset that the regulated trade or industry should influence the policies and the rules of the regulatory agency. To me this means that agency members must be free to address trade and industrial conventions. They must be free to discuss policies and rules with industry groups and even with individuals. A very good way of doing this, I think, is the Federal Trade Commission's device of the Trade Practice Conference. Similar cooperative practices should be widely encouraged. All this is, to me, "proper" influence.

So much for influence in policy-making and law-making. Permit me to turn now to the question of influence upon the decisional process. Here there are no grey zones, no doubtful areas. *Ex parte* procedures are of the utmost relevance. It is entirely improper and unethical for a committee of Congress, an individual congressman, a presidential agent, or an industry representative to seek to intervene *ex parte* in administrative litigation. This is "improper influence" in the nth degree whether it is manifested by a threat, by an inquiry, by a gift, by entertainment or by the payment of money in one guise or another. Here the administrative process has become the judicial process and the independence of the judges must be assured. This assurance can be effected very simply. Agency laws should be amended to provide that agency members cannot discuss the merits of pending or actual litigation with any party thereto unless *all* parties are given notice and an opportunity to be present and be heard. This would permit informal conferences to expedite hearings and shorten records without opening the door to improper influence. No ten-point code of ethics is required to do this.

It seems to me that the various codes of ethics currently in vogue are aimed at this exercise of improper influence in the decisional process. I do not believe they really intend to restrict the spheres of

influence which I have described as "proper." Unfortunately, the proposed codes tend to use a broad sweeping approach—a scattergun technique—presumably designed to net possible, as well as, actual evils. Apparently, the desired result is that agency members will be as insulated from temptation as a Trappist monk in his monastic cell. I suggest, as an undesirable result, that the agency heads will then regulate the industry as knowledgeably and effectively as the same Trappist monk in his monastic cell.

As you may have gathered, I am not an enthusiast for codes of agency ethics. On the other hand, I am not unalterably opposed to such codes. I merely urge, as forcefully as I can, that such codes may do more harm than good unless they are very carefully drawn. Codes of agency ethics cannot be considered *in vacuo,* as now seems to be the case. They must be related to administrative separation of powers, to the desirability, or undesirability, of "formalizing" and "judicializing" the administrative process, to policies governing agency appointments and to all proposals for the reform of administrative law. Only in this context does the term "agency ethics" take on significance.

The legislative process is not well suited to the eradication of sin and, in the final analysis, ethical codes are legislation against sin. If it is at all avoidable, wisdom dictates the avoidance of such legislation. Let us think long and hard before we enter the area of special competence of the moralists.

I hate to leave you in this frame of mind. You might, quite rightly, think me a churl and a knave. Let me advise you forthwith that I have long and steadfastly supported many noble causes —the Fourth of July, baseball and motherhood, for instance. In like spirit, I stand, foursquare, with all of my brethren who urge higher standards of ethics in the field of administrative law.

# THE NATIONAL COMMITTEE'S REPORT ON IMPLEMENTATION OF PRIOR ASSOCIATION ACTION AND LEGISLATIVE DEVELOPMENTS

This is a report of (1) the progress on major items within the jurisdiction of the Section which have been the subject of consideration and action during 1957-1958, and (2) current legislative developments in the 85th Congress. Additionally, this report brings up to date the two most recent submissions of the National Committee—the Report of the National Committee on Legislative Matters, as reproduced at 10 Ad. Law Bull. 15 (Fall Issue, 1957) and the Report of the National Committee dated February 10, 1958 (submitted to the Council on February 22, 1958, at its Los Angeles meeting).

## 1. *Fee Limitations*

The House of Delegates has authorized the Section to take appropriate action to the end that "statutory provisions or administrative action which place arbitrary or unreasonable limitations on fees for legal services to be rendered before administrative agencies" be removed. See 82 Reports of ABA 383. After conferences with the Chairman of the Committee on Representation before Agencies, drafts of two proposed bills were sent to the Council. One bill would repeal the federal statutory provision which limits to $10 the fee for administrative services in veterans' claims against the government. The second would repeal the limitation of 10 to 20 percent of the amount of the award or judgment which the administrator of the agency concerned or the federal judge may authorize be paid the successful attorney as a fee under the Federal Tort Claims Act.

See also 10 Ad. Law Bull. 202-203 for additional action taken by the Committee on Representation before Agencies in connection with fee limitations.

2. *Abbreviation of Record on Review*

On February 18, 1957, the House of Delegates authorized the Section to advance legislation providing for "the abbreviation of the record on the review or enforcement of orders of administrative agencies by the Courts of Appeals * * *." 82 Reports of ABA 383-384. H.R. 6788 supported by the Section before the House Judiciary Committee would accomplish this result. H.R. 6788 passed the House on August 5, 1957. The bill was then reported to the Senate Judiciary Committee where it was again supported by a Section representative. On August 4, 1958, the Senate Committee reported the bill favorably to the floor of the Senate. The report, S. Rep. No. 2129, states that H.R. 6788 "has been approved in principle by the American Bar Association * * *." The bill passed the Senate on August 14, 1958, and is now awaiting Presidential approval.

3. *Hearing Examiners*

Implementing Association authorization, 82 Reports of ABA 402-403, 416, the National Committee secured the introduction of H.R. 4921, H.R. 8387 and S. 1550 which amend Section 11 of the APA by establishing the compensation of examiners at Grade GS-18 and at the same time establishing the compensation of the Judicial Officer of the Department of Agriculture at the same annual rate as that authorized for the Assistant Secretary of Agriculture. H.R. 4921 and H.R. 8387 are pending before the Special Subcommittee on Administrative Procedure of the House Judiciary Committee. S. 1550 is pending before the Senate Post Office and Civil Service Committee.

4. *Recognition of Counsel*

In February 1957, the Board of Governors adopted a resolution recommended by the Section advocating that "whenever notice or service upon a person or party is permitted or required to be given or made by statute, rule or regulation, good practice requires that notice or service upon that person or party, if represented by an attorney of record, be made upon such attorney representative of the person or party." 82 Reports of ABA 403, 416-417. Section 407 of H.R. 3349, H.R. 3350 and S. 932 would accomplish this result.

These bills are still pending in the House and Senate Committees.

The Section's Committee on Representations before Agencies is also working with the Office of Administrative Procedure of the Department of Justice on a uniform rule governing the admission to practice of attorneys before all federal administrative agencies. See 9 Ad. Law Bull. 257, 260-261 and 10 Ad. Law Bull. 203.

5. *Renegotiation Act.*

On August 7, 1958, the House passed H.R. 11749. That bill provides for a six-month extension of the Renegotiation Act, instead of the two year extension requested by the administration. The bill provides for appeals to the United States Courts of Appeal on excessive profits determinations and makes clear that contracts let by government agencies for outer space projects would be covered by the contract renegotiation procedure. H.R. 11749 is now pending before the Senate Finance Committee.

Chairman Mills of the House Ways and Means Committee announced in connection with H.R. 11749 that the six-month extension would provide an opportunity for a complete study of the renegotiation program next year. The statement of Chairman Mills will afford Section representatives an opportunity to take action with respect to the Resolution of the House of Delegates of February 20, 1956, authorizing the Section to advance and support legislation which will provide contractors "a greater degree of procedural due process" in Renegotiation Board proceedings. See 81 Reports of ABA 385-386.

6. *Money Penalties Imposed by Federal Agencies*

On February 20, 1956, the House of Delegates directed the Section to take the necessary action to assure that "legislation authorizing Federal agencies to impose money penalties for alleged violation of law or regulations should not be authorized as a regulatory device except upon a most convincing justification and subject to fair procedural safeguards * * *." 81 Reports of ABA 384-385. The views of the Association in this regard were made known to the appropriate House and Senate Committees with respect to H.R. 5045, H.R. 6748 and S. 1577 (amending the penalty provisions of the Communications Act of 1934), H.R. 6418 and

S. 1749 (amending Section 610(a) of the CAA Act to provide civil penalties in certain cases), S. 1380 (authorizing the imposition of civil penalties for violation of the security provision of the CAA Act), and S. 1978 (relating to violations of the rules and regulations of the FCC in the common carrier, safety and public services field).

H.R. 5045, H.R. 6748, S. 1577 and S. 1978 have not been reported out of Committee and no action is anticipated during the present session of Congress.

S. 1380 passed the Senate and is now on the House calendar. The provisions of both S. 1749 and H.R. 6418 have been incorporated in S. 3880, which has passed both Houses of Congress and is now awaiting presidential approval. S. 3880 is the Federal Aviation Act of 1958.

7. *Congressional Committee on Administrative Procedure.*

By resolution adopted by the House of Delegates on February 20, 1956, the Association stated that it "believes that there should be established within the Congress of the United States a permanent Committee on Administrative Procedure" with specified duties outlined. 81 Reports of ABA 385.[1] H.R. Res. 119 in the current Congress, introduced at the request of the ABA would establish such a committee. This bill is a re-introduction of H.R. 462 (also introduced at the request of the Association) on which the Rules Committee of the House of Representatives held hearings on May 22, 23, and 24, 1956. At that time, leaders of the American Bar Association testified. As a result of those hearings, the House Committee on Government Operations interested itself in the questions raised, and prepared a comprehensive questionnaire which was sent to the agencies of the government. Agency responses to the questionnaire have now been published and are available. No action has been taken by the Rules Committee on H.R. Res. 119.

8. *Mail Detention*

On August 28, 1956, the Section resolved to oppose and seek the repeal of Sec. 2 of P.L. 821, approved July 27, 1956. See 9 Ad. Law

[1] See also Resolution of Board of Governors adopted at its May 19-20, 1958, meeting which creates an additional ad hoc committee to carry out the February 20, 1956, Resolution of the House of Delegates—see 10 Ad. Law Bull. 68, 224.

Bull. 240-241 for detailed discussion. H.R. 4383 in the present Congress proposes to repeal Section 2. The Chairman of the Section made known the views of the American Bar Association to both the House and Senate Post Office and Civil Service Committees. The views of the Association were formally incorporated into the record of the hearings of the House Post Office and Civil Service Committees on H.R. 4383 held August 6, 1958. Immediately thereafter the House Committee reported the bill favorably to the floor of the House where it is now pending.

9. *Immigration and Nationality*

The House of Delegates at its Atlanta meeting, February 24-25, 1958, authorized and directed the Association "to oppose legislation designed to restrict judicial review of deportation and exclusion orders * * *." See 10 Ad. Law Bull. 75. H.R. 13311 in the current Congress would restrict judicial review of orders of deportation and exclusion in a variety of ways, including elimination of judicial review at the district court level, barring of declaratory judgment actions, and limitation of venue *inter al.* Hearings were held before Subcommittee No. 1 of the House Judiciary Committee on July 10, 1958, at which time the Chairman of the Section's Committee on Immigration and Nationality testified in opposition to the enactment of the bill on the ground that it was unnecessary; that the form of judicial review proposed therein was inappropriate to immigration matters; and that the bill seriously and unwisely restricts judicial review now available under the Administrative Procedure Act. H.R. 13311 was reported favorably by the House Judiciary Committee and thereafter passed the House on August 12, 1958.

A succinct and concise review of other legislative developments in the immigration and nationality field in the 85th Congress is reported at 10 Ad. Law Bull. 159.

10. *Labor Relations Matters*

Of the many bills referred to the Section's Committee on Labor during the 85th Congress, particular attention was devoted to H.R. 6432 and S. 1723. These bills would amend Section 6(a) of the National Labor Relations Act to permit state courts and agencies to assert jurisdiction over labor disputes affecting interstate commerce if the NLRB would decline to assert jurisdiction

over such disputes on the gorund that the effect on commerce is not substantial. A bill to accomplish the identical purpose by amendment to Section 13 of the APA, S. 1933, was studied by the Section's Committee on the Administrative Procedure Act.

On July 13, 1957, the Section adopted the following resolution:

> *"Resolved,* That the American Bar Association supports the enactment of legislation or the taking of appropriate administrative action which will provide a remedy for the administrative inaction of the National Labor Relations Board described."

This resolution was thereafter approved by the House of Delegates. 82 Reports of ABA 181-182.

The Association's views were made known to both the House and Senate Labor Committee where the aforementioned bills are still pending.

On August 12, 1958, Congressman Kearns of Pennsylvania introduced H.R. 13739, a general labor reform bill. The bill incorporates in it the provisions of S. 1723 and H.R. 6432. H.R. 13739 is still pending in Committee.

At the February 21, 1955 meeting of the House of Delegates, the Association by resolution expressed its opposition to the transfer of "jurisdiction over unfair labor practice cases from the National Labor Relations Board to the Federal District Courts." 80 Reports of ABA 399. H.R. 3212 in the current Congress would amend the Labor Management Relations Act, 1947, to require unfair labor practice cases to be tried in the federal district courts. Arrangements were made for a Section representative to appear before the House Committee on Education and Labor to express the position of the Association on this bill, but no hearings have been held by that committee.

### 11. *Agriculture*

During the first session of the 85th Congress, the Agriculture Committee of the Section screened and reported on a number of bills referred to it. It devoted attention to H.R. 6814 (and companion bill S. 1747) which was enacted into law, Pub. Law No. 172, as the "Poultry Inspection Act" on August 28, 1957.

Since the report of the Agriculture Committee to the Section at the July, 1957 meeting, 9 Ad. Law Bull. 203, there have been referred to it S. 2727 (dealing with fluid milk standards) and H.R. 8324 (which would create an Agriculture Research and Industrial

Board). S. 2727 is still pending in Committee; while hearings were held on H.R. 8324, no further action has been taken by the House Agriculture Committee.

12. *Aviation*

S. 1423 passed the Senate on April 4, 1957. See S. Rep. No. 119. Section 1 of that bill, which is now pending before the House Committee on Interstate and Foreign Commerce, would amend Section 801 of the CAA Act by restricting the President's power to overrule CAB certification actions to foreign air transportation cases involving national defense or foreign policy. The following three resolutions are now before the House of Delegates in the form of a Provisional Report. See 10 Ad. Law Bull. 225-226.

> 1. "*Resolved,* That the American Bar Association supports the enactment of Section 1 of S. 1423, or successor legislation of similar import limiting Presidential review of decisions of the Civil Aeronautics Board, and,
>
> *Resolved,* That the Section of Administrative Law be authorized to represent the Association in the furtherance of this resolution.
>
> 2. *Resolved,* That the American Bar Association is of the view that decisions of the Civil Aeronautics Board which are subject to review by the President should be published and made available to the parties in the proceedings at the time of its submission to the President for review and decision.
>
> 3. *Resolved,* That the American Bar Association supports the enactment of legislation which will provide for judicial review in accordance with the provisions of the Administrative Procedure Act of orders of the Civil Aeronautics Board entered by approval by the President under Section 801 of the Act in so far as such orders deny or violate procedure rights of the parties to such proceedings."

13. *Food and Drug*

The Section's Committee on Food and Drugs had before it a number of bills introduced in the present session of Congress relating to chemical food additives and amendatory of the Federal Food, Drug, and Cosmetic Act (H.R. 366; H.R. 6747; H.R. 7100; H.R. 7700; H.R. 7798; H.R. 8390; H.R. 8629; H.R. Res. 311; etc.). These bills are pending before the House Committee on Interstate and Foreign Commerce.

However, on August 13, 1958 the House passed H.R. 13254, a bill relating to the control of food additives.

14. *Interstate Commerce Act*

Of the some 20 bills enacted into Public Laws during the first session of the 85th Congress and which touch the areas in which administrative law practitioners work, seven amend statutes administered by the Interstate Commerce Commission. The seven bills enacted into legislation are identified at 10 Ad. Law Bull. 15.

Late in the second session of the 85th Congress, S. 3778 was enacted into law. This enactment, now awaiting Presidential signature, is known as the Smathers Bill, or the Transportation Act of 1958. The legislation amends a variety of provisions in the Interstate Commerce Act.

15. *Public Contracts*

There have been referred to the Section's Committee on Public Contracts H.R. 7168 and S. 2300, identical bills which would prescribe policy and procedure in connection with construction contracts made by executive agencies. H.R. 7168, creating the Federal Construction Contracts Procedure Act, passed the House on June 24, 1957. See H.R. Rep. No. 434. This bill was thereafter reported out favorably by the Senate Judiciary Committee and is still pending on the Senate Calendar.

16. *Securities*

During the first session of the 85th Congress, a series of bills were introduced proposing amendments to the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940 and the Investment Advisers Act of 1940. These include H.R. 9326, H.R. 9327, H.R. 9328, H.R. 9329, H.R. 9330, and H.R. 9387, all of which have been referred to the Section's Committee on Securities. To date there has been no congressional action on these bills.

17. *Public Information*

H.R. 7172, H.R. 7173, H.R. 7174 and S. 2148, identical bills which would amend Section 3 of the APA "to clarify and protect the right of the public to information," were all introduced dur-

ing the last congressional session. The aforementioned bills were referred to the Section's Committee on the Administrative Procedure Act. No action has been taken on any of these bills during the current session of Congress.

However, the President recently signed S. 921 [2] which amends Section 161 of the Revised Statutes, 5 U.S.C. 22, by adding at the end thereof the following new sentence:

> "This Section does not authorize withholding information from the public or limiting the availability of records to the public."

The Senate report on S. 921 states, S. Rep. No. 1621: [3]

> "The purpose of this bill is to clarify the scope of the authority granted to the heads of executive departments under Section 161 of the Revised Statutes and to make it clear beyond any doubt that this statute in no way authorizes withholding of information from the availability of records to the public."

18. *Representation*

H.R. 261 (superseded by H.R. 276,) H.R. 3543, and H.R. 9144, referred to the Section's Committee on Representation before Administrative Agencies, would permit members of the bars of the highest state or federal courts to practice before all administrative agencies. No action has been taken by the House Judiciary Committee on these bills.

19. *Judicial Review*

At the Atlanta meeting of the House of Delegates on February 24-25, the House resolved to support the enactment of H.R. 272, 85th Cong., 1st Sess., a bill to permit judicial review of decisions of the Administrator of Veterans' Affairs with a recommended amendment which would substitute review in the appropriate United States District Court for review in the appropriate Court of Appeals. See 10 Ad. Law Bull. 75-76. H.R. 272 is pending before the House Judiciary Committee.

There is now before the Council a recommendation of the Section's Committee on Judicial Review that the Association support the enactment of H.R. 7866, 85th Cong., 1st Sess., a bill declaring the United States Court of Customs and Patent Appeals

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[2] H.R. 2767, H.R. 2768, H.R. 2769 and H.R. 3467 are identical bills.

[3] See also H.R. Rep. No. 1461 on companion bill H.R. 2767.

to be a court established under Article III of the Constitution * * *." See minutes of the February 22-23, 1958, meeting of the Council. H.R. 7866 was passed by the House of Representatives on August 4, 1958. The bill is now before the Senate Judiciary Committee.

The Committee on Judicial Review has requested reconsideration of its recommendation that the Association support the enactment of H.R. 6829, 85th Cong., 1st Sess., a bill granting to persons in the classified (competitive) civil service the right to a hearing before removal or suspension, and the right to a judicial review of a removal or suspension. H.R. 6829 is now pending before the House Committee on Post Office and Civil Service.

20. *Standards of Ethical Conduct*

The Provisional Report of the Section to the 1958 Annual Meeting of the House of Delegates would, if approved, authorize, *inter alia,* the President of the Association to (10 Ad. Law Bull. 225):

> "* * * designate a Special Committee of the Association or at his election to authorize the Section of Administrative Law to draft a Code of Agency Tribunal Standards of Conduct and to draft and seek the enactment of necessary supporting legislation * * *."

In aid of the task of any future committees dealing with standards of ethical conduct, the National Committee has collated a number of House and Senate bills introduced in the 85th Congress dealing with this subject. Of these bills, only H.R. Con. Res. 175 was enacted.[4] As of the time of the writing of this report, the

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[4] That enactment provides: "RESOLVED BY THE HOUSE OF REPRESENTATIVES (THE SENATE CONCURRING), That it is the sense of the Congress that the following Code of Ethics should be adhered to by all Government employees, including officeholders:

CODE OF ETHICS FOR GOVERNMENT SERVICE

Any person in Government service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.

3. Give a full day's labor for a full day's pay; giving to the performance of his duties his earnest effort and best thought.

4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.

following bills failed of enactment:

| H.R. or S. | Author | Title |
|---|---|---|
| S. 3306 | Proxmire | To prohibit the making of gifts to officials of Government agencies by persons having business with such agencies, and to prohibit the acceptance of such gifts. |
| S. 3979 | Neuberger | To promote ethical standards of conduct among Members of Congress and officers and employees of the United States, and for other purposes. |
| S. 4078 | Javits | To establish a code of ethics for the executive and legislative branches of the Government. |
| S. 4223 | Case | To promote public confidence in the integrity of Congress and the executive branch. |
| S.J. Res. 186 | Javits | To establish a Commission on Ethics in the Federal Government to study and develop necessary conflicts of interest legislation, including a code of ethics applicable to Members of Congress and to officers and employees of the executive branch of Government. |

5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.

6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.

7. Engage in no business with the Government, either dirctly or indirectly, which is inconsistent with the conscientious performance of his governmental duties.

8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.

9. Expose corruption wherever discovered.

10. Uphold these principles, ever conscious that public office is a public trust."

On the heels of H.R. Con. Res. 175, the Federal Power Commission adopted Administrative Order No. 66 ("Cannons of Conduct—Commissioners, Officers and Employees") and the Securities and Exchange Commission issued its own "Cannons of Ethics" (Federal Register, August 12, 1958).

| H.R. or S. | Author | Title |
|---|---|---|
| H.R. 10631 | Pelly | To promote ethics in Government. |
| H.R. 10846 | Moulder | To prohibit the making of gifts to officials of Government agencies by persons having business with such agencies, and to prohibit the acceptance of such gifts. |
| H.R. 11022 | Wolverton | To prohibit the using of improper methods to influence the acts or decisions of certain Federal regulatory agencies engaged in regulating activities or transactions in or related to interstate or foreign commerce. |
| H.R. 11249 and H.R. 13035 | Cramer Derounian | To prohibit the use of improper methods to influence the acts or decisions of certain Federal regulatory agencies engaged in regulating activities or transactions in or related to interstate or foreign commerce and to repeal authority of the Federal Communications Commission members to receive certain fees. |
| H.R. 11886 | Harris | To amend the Communications Act of 1934, for the purpose of more effectively protecting the public interest in the administration of such Act by the Federal Communications Commission. |
| H.R. 13216 | Keating | To establish a code of ethics for the executive and legislative branches of the Government. |
| H.R. Res. 644 | Keating | To establish a Commission on Ethics in the Federal Government to study and develop necessary conflicts of interest |

| H.R. or S. | Author | Title |
|---|---|---|
| | | legislation, including a code of ethics applicable to Members of Congress and to officers and employees of the executive branch of Government.[5] |

21. *Health, Education and Welfare Matters*

The Department of Health, Education and Welfare sought to attach a rider to the House Supplemental Appropriations bill, H.R. 13450, which would give that Department authority to employ additional hearing officers on a temporary basis without regard to the provisions of the Administrative Procedure Act. The requested exemption would permit temporary appointments without regard to the APA of persons as hearing examiners to hold hearings under Title II of the Social Security Act. The temporary appointment would terminate no later than December 31, 1959.

The Chairman of the Section appeared before the House Appropriations Subcommittee on Department of Health, Education and Welfare in opposition to the requested rider. The bill passed the House with the requested rider, and thereafter, was approved by the Senate Committee. The bill is now on the floor of the Senate. See H.R. Doc. No. 394 and S. Rep. No. 2350—85th Cong., 2d Session. As actually reported to the floor of the Senate, the rider requested by HEW reads as follows:

> "Provided, That persons who have been admitted to practice before a Federal or State Court of record who have had a minimum of 3 years' experience in the adjudication or consideration of claims for retirement, survivors, or disability benefits may be temporarily appointed by the Commissioner of Social Security to hold hearings under title II of the Social Security Act, as amended, but such temporary appointments shall terminate not later than December 31, 1959: Provided, further, That no person shall hold a hearing in any case concerned previously in the administration of such title II."

[5] See also S. 2461 and S. 2462. S. 2461 would make it a criminal offense for an official or employee of certain regulatory agencies to make public any information concerning an adjudicatory proceeding contrary to any provision of law on any rule or regulations of the agency. S. 2462 would make it a criminal offense for any person to attempt to influence the outcome of any adjudicatory proceeding which has been designated for hearing without giving notice to all interested parties.

22. *Other Matters*

No congressional action was taken with respect to any of the bills discussed below.

H.R. 9722 would create a United States Court of Veterans' Appeals for the purpose of reviewing determinations of the Board of Veterans' Appeals.

H.R. 9665 would provide for judicial review in the United States District Courts of administrative removals and suspensions of federal employees.

H.R. 12099 would amend the Legislative Reorganization Act of 1946 to authorize the review of administrative regulations by Committees of Congress prior to their promulgation.

S. 4064 would amend the Administrative Procedure Act and Communist Control Act of 1954 so as to provide for a passport review procedure and to prohibit the issuance of passports to persons going or staying abroad to support the communist movement.

H.R. 13011, H.R. 13036, H.R. 13288 and S. 3521 would amend Section 5 of the Administrative Procedure Act by inserting at the end thereof the following new subsection:

> "(e) PARTICIPATION.—After the case has been designated for hearing, it shall be unlawful for any party, or any other person to consult with or advise or to make any oral or written presentation concerning any question of law or fact involved in such case to any member, officer, or employee of the agency, unless upon notice and opportunity for all parties to participate. This subsection shall not apply to any communication between or among members, officers, or employees of any agency made in the performance of their official duties with respect to any matter pending before the agency; nor shall it be applicable with respect to any matter which any agency is authorized by law to determine upon ex parte application of any party; nor shall it apply to communications between any party, or any other person, and officers, employees, or agents engaged in investigative or prosecuting functions for the agency who are forbidden by statute to participate or advise in any decision, recommended decision, or agency review pursuant to Section 8 except as witness or counsel in public proceedings."

H.R. 11782 would amend Section 10 (e) of the Administrative Procedure Act by inserting at the end thereof the following new sentence:

> "Where the reviewing court determines that, in the course of the agency proceeding leading to the agency action being reviewed,

the agency issued or released any public statement tending to discredit any party to the proceeding, the court shall regard such statement as constituting a prejudging of the issues and may set aside any agency action against such party, or enter other appropriate order."

Respectfully submitted,

August 14, 1958

ARNOLD LEVY, *Chairman*
*The National Committee*

# MINUTES
# OF
# COUNCIL MEETING

AMBASSADOR HOTEL—LOS ANGELES, CALIFORNIA
AUGUST 23-24, 1958

The meeting of the Council of the Section of Administrative Law convened at 2:00 p.m. on August 23, 1958, in the Colonial Room, Ambassador Hotel, Los Angeles, following a luncheon.

*Attendance:* All officers and members of the Council except Whitney R. Harris, William I. Denning, Charles B. Nutting, and Rufus G. Poole were present.[1] In addition, approximately 25 other members of the Section, including several chairmen and vice-chairmen of committees, were present.

## I. *Agenda*

A tentative agenda was distributed and approved, a copy of which is attached to the master copy of these Minutes.

## II. *Minutes*

Minutes of (1) the Midyear Meeting of the Council and (2) the June 1958 mail ballot action by the Council on two matters (Aviation Committee Resolutions and Fee Limitation bills) were approved.

## III. *General Announcements and Discussions*

Chairman Donald C. Beelar made a number of announcements. There was general discussion of the affairs of the Section, including the Fall Briefing Conference; the status of the budget and the fact there has been an increase in reserve fund without a request for voluntary contributions during the year; the present membership and ways in which the membership can be increased, looking

[1] Clarence A. Davis was in attendance on Saturday only.

toward a goal of 3,000 members; and the beneficial effect of the liaison with governmental agencies. Harold L. Russell suggested that inactive members should be given an opportunity to raise questions of interest to them. Hans Klagsbrunn agreed and suggested that there might be circulated a check list of areas of interest and attention then focused upon those in which sufficient interest is indicated. John W. Cragun expressed what he termed a "discordant note," *i.e.,* that we are not a service bureau for agencies but are charged by the American Bar Association with the duty of improvement of administrative law. Hans Klagsbrunn agreed, but expressed the further view that the goal of the matters under discussion is one of improvement. Kenneth Teasdale spoke for the members outside of Washington and said that while they do not get drawn into administrative law matters as often as do Washington lawyers, they do want to be equipped to advise clients and thus would like to, first, get run-of-the-mill information and, afterwards, "sophistication" and that with that goal in view they would welcome programs such as those discussed which would furnish a working idea of agency practice.

IV. *Administrative Law Bulletin*

After a general discussion of the function of the Administrative Law Bulletin, with emphasis upon the necessity for making its contents interesting to the members as a whole, Frank C. Newman moved that the Board of Editors of the Bulletin be instructed to prepare for consideration by the Council at the 1959 Midyear Meeting suggestions for content of the Bulletin over a period of years. Pursuant to the suggestion of Hans Klagsbrunn, the motion was amended to provide that the Board of Editors be supplemented by two or three members of the Council as advisors. The motion, as amended, was duly seconded and adopted.

Chairman Beelar presented for consideration the question of whether publication in the next issue of the Bulletin should be made of: (1) Report of Labor Committee, (2) Report of Postal Matters Committee, (3) Report of National Committee on Legislative Matters, and (4) Collation prepared by Arnold Levy, Chairman of the National Committee; and it was suggested that Council members express their views thereon to the incoming Chairman.

V. *Information Reports of Council Liaison Members With Other Sections*

1. *Taxation Section*

John W. Cragun, liaison with the Tax Section, reported that he had met with representatives of the Tax Section relative to that Section's position with respect to the proposed Administrative Code and their fear of judicial review of certain tax rulings; that the Tax people proposed two amendments to the proposed Code with which he disagreed; and that while the Tax Section first considered asking the House of Delegates for approval of their position, it is his understanding that they have now decided to take no action, at least, for the present.

2. *Junior Bar Conference*

L. Clair Nelson reported on liaison with the Junior Bar Conference and stated that, while we had "gotten the jump on" other Sections in our efforts to interest Junior Bar members, other Sections are now trying to take advantage of the idea and as a result the Junior Bar Committee, originally formed to work with our Section committee, has now been expanded to work with all interested Sections.

3. *Public Utility Law Section*

Harold L. Russell, liaison with the Public Utility Law Section, stated that the Public Utility Section had not been particularly active in the administrative law side and that he had nothing of importance to report.

4. *Judicial Administration*

Donald C. Beelar, liaison with the Judicial Administration Section, reported that such Section had had no committee dealing with the problem of the review of administrative agency decisions, but that Justice Tom C. Clark, its chairman, has recently appointed a new committee to consider all problems unique to such review.

5. *Corporation and Business Law Section*

Hans Klagsbrunn, liaison with the Section of Corporation and Business Law, reported that he had encountered no consideration

of procedural aspects of interest to the Section of Administrative Law.

6. *Antitrust Section*

Earl W. Kintner, liaison with the Antitrust Section, reported progress on revision of the Rules of the Federal Trade Commission, with the cooperation and assistance of the Antitrust Section.

## VI. *Review of Provisional Report*

After considerable general discussion, Frank C. Newman moved that the Council ratify approval of Resolutions 2, 3, 4 and 5 of the Provisional Report.[2] The motion was seconded by Earl W. Kintner. By agreement the motion was then modified so as to strike the word "its" in Resolution No. 4; change the word "procedure" to "procedural" in Resolution No. 5; and also to provide for change in number of section and name of the statute, to conform with the newly enacted Federal Aviation Act of 1958. The motion, as amended, was adopted. Thereafter, it was duly moved, seconded and adopted that the Council recommend to the Section that it authorize the Section's representatives to acquiesce in the foregoing revisions in the Provisional Report and to seek implementation of the action contemplated. The motion was opposed by Robert M. Benjamin, who urged that the matter be delayed until the Midyear Meeting. No action was taken by the Council at the Los Angeles meeting with specific reference to Resolution No. 1 of the Provisional Report.

## VII. *Agenda of Section Meeting*

A tentative agenda of the Section Meeting was distributed. After some discussion of the order of matters on the agenda, it was moved by Robert M. Benjamin that the report of the Nominating Committee be orally announced at the beginning of the Section Meeting on Monday afternoon, August 25, and that there then also be announced the time and place at which opportunity would be afforded for additional nominations to be made from the floor, as provided in Article IV, Section 1, of the By-Laws. The motion was seconded by John W. Cragun, and adopted. The tentative agenda, as revised by the foregoing motion, was then approved.

[2] These Resolutions are set forth in 10 Ad. Law Bull. 225-226.

VIII. *Committee Reports*

Chairman Beelar announced that, in the consideration of committee reports, the committee chairman would be recognized to present the report and the Council liaison for the committee would then be recognized to move whatever action is desired.

1. *Agency Rule Making*

The report of this committee is found at 10 Ad. Law Bull. 128. No action was recommended by the committee. However, Mr. Newman moved that the Council recommend that the Committee on Agency Rule Making study the question of public notice referred to in the discussion of Item II of the Communications Committee Report. 10 Ad. Law Bull. 129, 132-135. The motion was seconded by Robert M. Benjamin and duly adopted.

2. *Communications*

The report of the Communications Committee is found at 10 Ad. Law Bull. 129-145. Arthur W. Scharfeld, chairman of the committee, briefly reviewed the report. No action was recommended by the committee and none was taken by the Council, other than that hereinbefore set forth under Agency Rule Making.

Mr. Beelar suggested that any action taken by an agency should be reasonably within the scope of the public notice given by it and Mr. Scharfeld agreed.

3. *Food and Drugs*

The report of this committee is found at 10 Ad. Law Bull. 146-147. No action was recommended by the committee and none was taken by the Council.

4. *Health, Education and Welfare*

The report of this committee is found at 10 Ad. Law Bull. 148-149. No action was recommended by the committee and none was taken by the Council.

5. *Hearing Examiners*

The report of this committee is found at 10 Ad. Law Bull. 150. No action was recommended by the committee and none was taken by the Council.

6. *Immigration and Nationality*

The report of this committee is found at 10 Ad. Law Bull. 151-159. Harry N. Rosenfield, chairman of the committee, discussed the report briefly.

a. *Statute of Limitations for Deportation and Revocation of Naturalization Proceedings*

Hans Klagsbrunn moved that the Council recommend to the Section approval of Resolution 1 contained in the report of the committee. The motion was duly seconded and adopted.[3]

b. *Fees Charged by Immigration and Naturalization Service*

Kenneth Teasdale moved that the Council recommend to the Section approval of Resolution 2 contained in the report of the committee. The motion was duly seconded and adopted.[4]

7. *Indian Matters*

The report of the Indian Matters Committee is found at 10 Ad. Law Bull. 160-162. No action was recommended by the committee and none was taken by the Council.

8. *Interstate Commerce Act*

The report of the Interstate Commerce Act Committee is found at 10 Ad. Law Bull. 163-165. No action was recommended by the committee and none was taken by the Council.

9. *Judicial Review*

The report of the Judicial Review Committee is found at 10 Ad. Law Bull. 166-172.

a. *Civil Service Employees (H.R. 6829)*

Robert M. Benjamin moved that the Council recommend against adoption of the recommendation of the Judicial Review

[3] See 10 Ad. Law Bull. 151 for text of the Resolution approved under this motion; and paragraph IX, 5a (page 12) of Minutes of Section meeting, for Section action thereon. *Ed.:* The Section approved the Resolution.

[4] See 10 Ad. Law Bull. 151 for text of Resolution approved under this motion; and paragraph IX, 5b (pages 12-13) of Minutes of Section Meeting, for Section action thereon. *Ed.:* The Section approved the Resolution.

Committee that H.R. 6829 be approved. This motion was seconded by Earl W. Kintner. After some discussion, Frank C. Newman moved, as a substitute motion, that the Council recommend to the Section that the Section take no further action on this matter. The substitute motion was seconded by Charles E. Long, Jr. and adopted.

b. *Hearings and Judicial Review in re Correction of Military Records*

Frank C. Newman moved that the Council recommend to the Section approval of the recommendation of the committee with respect to S. 2036, 85th Cong., 1st Sess., as revised by the deletion of paragraph (c) and the renumbering of subparagraphs (d) and (e) accordingly. After some discussion the motion was seconded and adopted.[5]

10. *Labor*

The report of the Labor Committee was received too late for publication in the Bulletin. A copy of such report is attached to the master copy of these minutes. No action was recommended by the committee and none was taken by the Council.

Mr. Newman spoke on general failure of the agency to give notice in the Federal Register in rule making proceedings, as required by the Administrative Procedure Act. Hans Klagsbrunn suggested that the matter could be handled by the agency liaison committee. Mr. Beelar suggested that the Public Information Committee might also be interested in it.

11. *Maritime Transportation*

The report of the Maritime Transportation Committee is found at 10 Ad. Law Bull. 173-175. No action was recommended in the committee report and none was taken in connection therewith by the Council.

12. *Mobilization*

The report of the Mobilization Committee is found at 10 Ad. Law Bull. 176-183. Frank X. Brown, chairman of the committee,

[5] See 10 Ad. Law Bull. 168 for text of Resolution and paragraph IX, 1a (page 6) of Minutes of Section Meeting, for Section action relative thereto. *Ed.:* The Recommendation as subsequently amended was approved by the Section.

discussed the report briefly and presented a revision of the Resolution recommended by the committee. Hans Klagsbrunn moved that the Council recommend to the Section the adoption of the revised Resolution of Committee on Mobilization. The motion was seconded by Earl W. Kintner and adopted.[6]

### 13. *Natural Resources and Interior Affairs*

The report of the Committee on Natural Resources and Interior Affairs is found at 10 Ad. Law Bull. 184-188. No action was recommended by the committee and none was taken by the Council.

### 14. *Organization and By-Laws*

The report of the Organization and By-Laws Committee is found at 10 Ad. Law Bull. 193. No action was recommended by the committee and none was taken by the Council.

### 15. *Public Contracts*

The report of the Committee on Public Contracts is found at 10 Ad. Law Bull. 194-196. Bernard J. Gallagher, chairman of the

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[6] The revised Resolution of Committee on Mobilization which the Council by this motion recommends that the Section adopt reads as follows:

"*Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'WHEREAS, Current national policies relating to mobilization of the resources of the United States to defend itself against aggression, whether in a general war involving nuclear attack or in conflicts short of general war, have recently undergone revision, and appropriate legislation and agency regulations will be required to support these policies, and

'WHEREAS, To assure the adoption of administrative procedures and administrative safeguards regularly supported by the Association, to the maximum extent consistent with emergency legislation, it is necessary that such legislation and regulations be considered before and apart from a crisis atmosphere, and

'WHEREAS, Such preparations as are being made for appropriate legislation and regulations are not publicly known,

'*Be It Resolved,* That the American Bar Association supports immediate and current consideration in the Congress and the executive branch of the Federal Government of such administrative procedures and administrative safeguards regularly supported by the Association as may be best suited to mobilization and other emergency legislation, and

'*Resolved,* Further, that the Section of Administrative Law be authorized and directed to express this need to appropriate committees of Congress and agencies of Government and to work with them toward the adoption of such procedures and safeguards.' "

Committee on Public Contracts, spoke briefly on the report of the committee, which he termed a "progress report." No action was recommended by the committee and none was taken by the Council.

16. *Postal Matters*

The report of the Postal Matters Committee was received too late for publication in the Bulletin. A copy of such report is attached to the master copy of these minutes. No action was recommended by the committee and none was taken by the Council.

17. *Public Information*

The report of this committee is found at 10 Ad. Law Bull. 197-201. In the absence of John Mitchell, chairman of the committee, L. Clair Nelson, Council liaison, stated that the report was out of date in one respect, in that legislation to clarify certain "housekeeping" aspects of departments and agencies has been enacted since the report was written. No action was recommended by the committee and none was taken by the Council.

18. *Representation Before Agencies*

The report of the Committee on Representation Before Agencies is found at 10 Ad. Law Bull. 202-204. No action was recommended by the committee and none was taken by the Council. Robert M. Benjamin expressed belief that some limitation should be fixed on fees. Chairman Beelar requested Mr. Teasdale, Council liaison, to ascertain from Theodore H. Haas, chairman of the Committee on Representation Before Agencies, explanation as to why no new limitation was suggested.

19. *Securities*

The report of this committee is found at 10 Ad. Law Bull. 205-218. C. Roger Nelson, chairman of the committee, briefly reviewed the report of the committee.

a. *Withdrawal of Registration Statements*

After some discussion, Earl W. Kintner moved that Council recommend to the Section that the subject matter of Resolution 1 recommended by the Securities Committee—relating to right to

withdrawal of registration statement—be referred back to the committee for further study. This motion received no second. Frank C. Newman then moved that the Council recommend that the Section consider and take action on committee's Resolution 1, as modified by the supplemental report given orally by the chairman of the committee, without other recommendation from Council. The motion was seconded by Harold L. Russell and adopted, with Mr. Kintner dissenting.[7]

b. *Effective Date of Registration Statements*

Mr. Nelson discussed the recommendation of the committee with respect to this matter. Harold L. Russell then moved that the Council recommend that the Section consider Resolution 2 of the Securities Committee without any recommendation from the Council other than that the first "Whereas" clause in the Resolution should be deleted. The motion was seconded by Frank C. Newman and adopted.[8]

20. *State Administrative Law*

The report of the State Administrative Law Committee is found at 10 Ad. Law Bull. 219-220. No action was recommended by the committee and none was taken by the Council.

21. *Treasury Department*

This committee made no report, but L. Clair Nelson expressed the view that it had served effectively as a "watchdog."

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[7] The Resolution which the Council, by this motion, recommends to the Section is found on pages 207-209 of 10 Ad. Law Bull., as modified by the deletion of the subsection (2) there reported and the substitution therefor of the following language:

> "(2) To support amendments of the above Acts which will provide, with respect to a registration statement or application for registration which has not become effective, (a) an unlimited right of withdrawal before the Commission has given notice that it has begun proceedings looking toward denial or suspension of effectiveness, (b) a right of withdrawal after such notice unless the Commission, promptly after an application for withdrawal is filed, issues an order prohibiting withdrawal which contains or is accompanied by findings in support of a determination that withdrawal would be contrary to the public interest or the protection of investors."

See paragraph IX, 3a (pages 8-9) of the Minutes of the Section Meeting for action by the Section relative to this Matter. *Ed.:* The Section approved the Resolution.

[8] The Resolution covered by the motion is found at 10 Ad. Law Bull. 209.

## 22. *Ad Hoc Committee on Code of Agency Conduct*

The report of the Ad Hoc Committee was received too late for publication in the last issue of the Bulletin. A revised copy thereof is attached to the master copy of these minutes.

Frank C. Newman reported on a breakfast meeting, at which those attending agreed that the Council should not present a detailed proposal and should consider a code of agency conduct and influence-peddling problems separately from the question of separation of functions within an agency; whether objectives sought could be best effected by statutory reform or by agency rule or code; and expansion of February Resolution, since the problems are broader than adjudication—the breakfast group felt other administrative proceedings are harmed by *ex parte* participation. Albert E. Stephan, chairman of the Ad Hoc Committee, agreed with Mr. Newman's summary of the breakfast meeting and expressed the further view that court-like proceedings should receive court-like treatment. Hans Klagsbrunn mentioned Canon of Judicial Ethics and expressed opinion that advantage should be taken of judicial precedence and experience. Robert M. Benjamin reminded that present statute prohibits appearance of congressmen for pay and also mentioned dual capacity of agency members. John B. Gage spoke relative to "adversary proceedings" and the difficulty encountered in attempting to define the term accurately, that he believes adjudication should be governed by judicial standards, that it can be defined, and that the definition should be statutory. Harold L. Russell then moved that the report of the Ad Hoc Committee be referred to the Section for consideration without recommendation. The motion was seconded by Earl W. Kintner and adopted.[9]

The Annual Meeting of the Council adjourned at 1 o'clock p.m., Sunday, August 24, 1958.

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[9] The motion adopted by the Section reads as follows:

"*Resolved,* That the Section of Administrative Law endorse the proposed minimum requirements of conduct in adversary proceedings as recommended by its Ad Hoc Committee on Code for Agency Conduct in the Report of that Committee, with authority to the Council to make appropriate revisions within the framework of the substance of the code proposed by the Committee, with the view to presenting the same to the Board of Governors or House of Delegates for approval at the earliest opportunity; and that the Section recommend that the American Bar Association take prompt action to urge each agency to adopt the substance of the recommended code, within the statutory framework of their respective powers, as it may relate to their respective duties and personnel."

## PROGRAM FOR THE DECEMBER PRACTICE FORUM *

### A Briefing Conference on Practical Problems before Federal Administrative Agencies to be held at the Mayflower Hotel

*December 11 and 12, 1958*

The Briefing Conference will begin with a luncheon at noon on December 11, 1958. The feature will be an address by the Honorable David W. Kendall, the new Special Counsel to President Eisenhower. Immediately after the luncheon the formal program will begin:

2:00 P.M.– 4:30 P.M. I. Assistance available to the public, including private practitioners.

A. Interpretative advice—how to present the problem; confidential treatment of inquiries; force and effect of interpretative rulings; difference between ad hoc and legislative rulings; filing of complaints after informal staff discussion; staff level advice on proposed courses of action and other informal staff clearances; effect of opinion and no-action letters on subsequent agency action and in proceedings between private parties; public availability of legislative rulings.

B. Complaints on behalf of client—presentation of complaint; scope of agency discretion; considerations of agency in instituting agency enforcement action.

C. Agency intervention and participation amicus curiae in private proceedings—purpose; securing agency intervention or participation amicus curiae; factors considered by agency in making such a decision.

4:30 P.M.– 5:30 P.M. Questions and answers—participation by all panelists.

* Program is tentative and subject to change.

*Friday, December 12th*

9:30 A.M.–11:30 A.M. II. Practical problems in the conduct of administrative proceedings–pre-trial, role of the examiner and discovery.

A. Responsive pleadings; advisability of the use of pre-trial conferences; stipulations; availability of subpoenas.

B. Functions of the examiner in pre-trial, determining course and procedures of hearings; extent to which the agency permits interlocutory appeals from decisions of examiner.

C. Bill of particulars; the obtaining of depositions and discovery before the agencies; notices to admit; applications of *Jencks* rule.

11:30 A.M.–12:30 P.M. Questions and answers–participation by all panelists.

12:30 P.M.– 2:00 P.M. Lunch and luncheon address:
"Practices and Policies of the Office of the Solicitor General in Handling Administrative Agency Matters before the Courts"
Honorable Robert L. Stern, formerly Acting Solicitor General of the United States.

2:00 P.M.– 3:30 P.M. III. Negotiation and settlement–consent decree in an injunctive action brought by an agency; offers of settlement–stipulations of the record and judgment in administrative proceedings; conferences in the agency and the Department of Justice in cases leading to criminal prosecution; problems of primary jurisdiction.

3:30 P.M.– 4:30 P.M. IV.

A. Scope of order and judicial review; extent and detail of provisions; nature of prohibitions; enforcement provisions.

B. Opportunity to take exceptions to recommended decisions; when will

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| | agency review examiner finally decide; nature of agency review; agency review procedure and due process. |
| 4:30 P.M.– 5:30 P.M. | Questions and answers—participation by all panelists. |

A tour of the White House has been arranged on Friday morning, December 12, for the wives of all participants. Plans for the proposed Canadian social hour at the conclusion of the Briefing Conference on Thursday, December 11, are being developed.

The proposed registration fee for the Institute is $13.00 which will include tickets to the two luncheons as well as admission to all discussions.

Each discussion will be led by a moderator with a panel made up of representatives from the various agencies as well as private practitioners.

The Mayflower Hotel is reserving rooms for all those desiring such facilities. Reservations should be made directly through the hotel.

## Miscellaneous

John F. Cushman has been named Director of the Office of Administrative Procedure in the Department of Justice. Mr. Cushman succeeds J. Smith Henley, recently appointed judge of the United States District Court for the Eastern District of Arkansas.

Mr. Cushman was an attorney in the Department of Justice from 1951 to 1957 and became an Associate General Counsel of the Interstate Commerce Commission in 1957.

The Office of Administrative Procedure which Mr. Cushman will head was established in 1956. In cooperation with the departments and agencies of the federal government, the office seeks to improve the administrative procedures used in determining the rights, duties and privileges of persons by conducting studies, publishing facts and statistics and providing advisory assistance upon request to the government units.